

Bush Administration Policy Regarding Congressionally Originated Earmarks: An Overview

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Summary

During the 110th Congress, the House of Representatives, the Senate, and the George W. Bush Administration have defined terms like *congressional earmark*, *congressionally directed spending item*, and *earmark*, and have provided some direction for how congressionally originated earmarks, according to these definitions, are to be handled. This report focuses on Bush Administration policy regarding earmarks originated by Congress and related issues. Specific definitions for the term *earmark* (and related terms, like *congressional earmark*, *presidential earmark*, and others) vary considerably and are controversial. Nevertheless, all of the terms relate to the use of discretion to allocate particularized benefits to one or more specific purposes, entities, or geographic areas. Some earmarks have the force of law, and others do not. Practices like earmarking have been used for decades, if not centuries, to make decisions regarding the allocation of public resources, but concerns also have been expressed. At the same time, Congress, its Members, and Presidents have asserted the prerogatives of their constitutional and statutory authorities and pursued their budget policy preferences.

In January 2008, the President announced he would veto future appropriations bills that did not cut the number and funding of Administration-defined *earmarks* by half, relative to FY2008. The President also issued Executive Order (E.O.) 13457, which directed that agencies “should not” fund non-statutory earmarks, except under some conditions. OMB subsequently directed agencies on how to implement the E.O. after enactment of FY2009 continuing and regular appropriations. These are the latest in a series of developments that began in January 2007, when the President proposed that Congress should (1) cut the number and funding of congressionally originated earmarks by at least half for FY2008 appropriations, relative to FY2005, and (2) place them only in statutory text, not report language. In January 2007, the Administration issued its own definition of *earmark*, whose language (and perhaps meaning) evolved over time in Office of Management and Budget (OMB) memoranda. A final definition appears to have been established in E.O. 13457, but its meaning probably is informed by the evolution and contents of previously articulated definitions. Later, OMB established an “Earmarks” website, containing a database of Administration-identified *earmarks*, to track congressional action. Potential related issues for Congress involve, generally, roles and responsibilities for Congress, the President, agencies, and the public in the U.S. political system; defining, identifying, and overseeing earmarks; the executive order; the “Earmarks” website and database; and potential representational consequences.

This report emphasizes analysis of E.O. 13457. For a legal analysis of E.O. 13457, see CRS Report RL34373, *Earmarks Executive Order: Legal Issues*, by Thomas J. Nicola and T. J. Halstead. This report will be updated as warranted and at the conclusion of the George W. Bush Administration.

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Introduction

Budgeting has been defined as the allocation of scarce resources.¹ It involves choices about how to raise revenues and allocate resources among alternative purposes, locations, and recipients. These choices frequently are made in an environment of competing views about the public interest, leading one scholar to conclude that “conflict is endemic to budgeting.”² Conflict may arise, for example, because federal policy makers often have different priorities about the sources and uses of public funds. Some priorities may be based on policy makers’ views on the proper role of government, the offices and positions in government they hold, or the constituencies they represent. Policy makers also may have different views on “who decides.” In the federal budget process, one such area of budgetary conflict has concerned “earmarking.” Specific definitions for the term *earmark* (and related terms, like *congressional earmark* and *presidential earmark*) vary considerably and are controversial.³ Nevertheless, all of the terms relate to the use of discretion to allocate funding or other benefits to one or more specific purposes, entities, or geographic areas.

During the 110th Congress, the House of Representatives, the Senate, and the George W. Bush Administration defined the terms *congressional earmark*, *congressionally directed spending item*, and *earmark*, respectively. In addition, the House, Senate, and President provided directions for how congressionally originated earmarks are to be handled during the budget process. In January 2008, for example, the President announced he would veto future appropriations bills that did not cut the number and funding of Administration-defined and -identified *earmarks* by half, relative to FY2008. The President also issued Executive Order (E.O.) 13457, which directed that agencies “should not” fund non-statutory earmarks, except under some conditions.⁴ OMB subsequently directed agencies on how to implement the E.O. after enactment of FY2009 continuing and regular appropriations. These are the latest in a series of developments that began in early 2007, when the President made proposals regarding earmarks originated by Congress, and the Office of Management and Budget (OMB) issued a series of memoranda and took corresponding actions to implement the President’s policy.

This report provides an analysis of Bush Administration policy regarding congressionally originated earmarks, focusing primarily on the veto threat and E.O., and related issues for Congress.⁵ To provide context and an analytical foundation, the report first discusses conceptual definitions of earmark-related terms. It then examines potential explanations of why earmarking might occur and several concerns that have been expressed about earmarking. Because the Bush Administration expressed interest in congressionally originated earmarks before the 110th Congress, the report briefly reviews previous Administration policy statements and proposals.

¹ For example, see Irene S. Rubin, *The Politics of Public Budgeting: Getting and Spending, Borrowing and Balancing*, 4th ed. (New York: Chatham House, 2000), p. 3.

² Irene S. Rubin, “Understanding the Role of Conflict in Budgeting,” in Roy T. Meyers, ed., *Handbook of Government Budgeting* (San Francisco: Jossey-Bass, 1999), p. 30.

³ For clarity, references to specific terms in this report are shown in *italics*.

⁴ Executive Order 13457, “Protecting American Taxpayers From Government Spending on Wasteful Earmarks,” 73 *Federal Register* 6417, Jan. 29, 2008.

⁵ Additional topics concerning Bush Administration policy regarding congressionally originated earmarks are not addressed in detail in this report. These topics include (1) OMB memoranda and their directions to agencies for FY2007 and FY2008; (2) agency responses to the OMB memoranda; (3) analysis of the evolution, meanings, and potential implications of several versions of the Administration’s definition of *earmark*; (4) comparison of Administration and congressional definitions of earmark-related terms; (5) Administration actions related to earmarks (or lack of earmarks) in FY2007 and FY2008 appropriations; (6) creation and implementation of an OMB “Earmarks” website and database; and (7) the legal status of congressionally originated, non-statutory earmarks.

Subsequent sections discuss and analyze the Administration's veto threat and executive order. The report culminates with potential issues for Congress, including the potential for developments to affect the roles of Congress and the President in the budget process. Because the E.O. formally will remain in effect unless it is revoked, some of these issues may continue to be relevant after the swearing in of the next President. Furthermore, because Bush Administration policy was articulated in some detail, aspects of the policy may be relevant to future discussion of federal budgeting and earmarking issues.

Conceptions About Earmarking

Any discussion of earmarks cannot escape the matter of definitions.⁶ As noted earlier, specific definitions for the term *earmark* (and related terms, like *congressional earmark*, *congressional directive*, *presidential earmark*, *administration earmark*, *executive branch earmark*, and *directed spending*) vary considerably and are controversial.⁷ Nevertheless, all of the terms relate to the use of discretion to allocate particularized benefits—subsets of funding or other resources or benefits—through law, non-statutory direction (e.g., report language, which is not legally binding), or administrative action (e.g., making a budget proposal or awarding a contract or grant) to one or more specific purposes, entities, or geographic areas. Practices like earmarking have been used for decades, if not centuries, to make decisions regarding the allocation of public resources,⁸ but concerns also have been expressed. At the same time, Congress, its Members, and Presidents have asserted the prerogatives of their respective constitutional and statutory authorities and pursued their budget policy preferences. Earmarks, or similar practices that result in functionally equivalent outcomes, might be originated by Members of Congress, the President, or agencies, or possibly jointly.

Congressionally Originated Earmarks

Earmarks may be included by the House or Senate, or at the initiative of a Member or committee of Congress, in appropriations, authorization, or revenue bills, which, when enacted, have the force of law. Many appropriations-related earmarks commonly are included in report language and joint explanatory statements. The latter documents do not have the force of law, but typically accompany legislation and communicate to agencies congressional intent, expectations, directions, understandings, exhortations, and warnings.⁹ In some instances, provisions within

⁶ Throughout this report, earmark-related terms are used in relation to spending provisions, due to the focus of Bush Administration activities on the same subject. Some observers, however, might use the term formally or colloquially to apply to tax or tariff benefits and other forms of federal assistance or benefits.

⁷ No single definition of the term *earmark*, or other earmark-related term, has been embraced by all practitioners and observers of the appropriations, revenue, and budget processes. A contributing factor to the difficulty of defining the term and its variants is that the mere act of budgeting—allocating subsets of resources or benefits to specific purposes, entities, or geographic areas—could be considered by some observers to be a form of earmarking, regardless of whether the allocation is being done by Congress, the President, or an agency official. For background on the definition issue, see CRS Report 98-518, *Earmarks and Limitations in Appropriations Bills*, by Sandy Streeter.

⁸ For example, see U.S. Government Accountability Office, *Congressional Directives: Selected Agencies' Processes for Responding to Funding Instructions*, GAO-08-209, Jan. 2008, pp. 8-10; James Q. Wilson, *Bureaucracy: What Government Agencies Do and Why They Do It* (New York: Basic Books, 1989), pp. 327-345; and Richard F. Fenno, *Congressmen in Committees* (Boston: Little, Brown and Co., 1973), pp. 139-156.

⁹ For more information, see CRS Report 98-558, *Appropriations Bills: What Is Report Language?*, by Sandy Streeter; and CRS Report 98-382, *Conference Reports and Joint Explanatory Statements*, by Christopher M. Davis.

report language and joint explanatory statements may be incorporated expressly, or by reference, into the text of a statute, making them legally binding.¹⁰

Presidentially and Agency-Originated Earmarks

Presidential and agency earmarking may be less familiar than congressional activity, yet appears to be functionally equivalent. For example, a former OMB official reportedly said that “[a]s he recalls, presidents use earmarks much as members of Congress do....”¹¹ Presidential or agency-originated earmarks may be (1) requested explicitly within a budget proposal to Congress; (2) embedded within an agency’s spending plan before or after enactment of the agency’s appropriations; (3) effected during a fiscal year by a decision to allocate and obligate funds for a specific contract, grant, initiative, or program; or (4) facilitated by using discretion to make entities or geographic areas eligible to receive benefits. The President, political appointees, career civil servants, or combinations thereof may be involved in any of these activities. During and after the FY2008 appropriations process, for instance, some Members of Congress reportedly have viewed actions by the President and executive agencies as amounting to earmarks.¹²

“Joint” or “Hybrid” Earmarks

An earmark may be included in a bill or report language at the prompting of the White House or an agency at any point in the legislative process. Joint origination also may occur with regard to a President’s or agency’s plans and actions for budget execution (e.g., after discussions between Members of Congress and agency officials or the President). Instances such as these might raise questions about whether an earmark should then be considered congressionally or presidentially originated or, alternatively, be considered a hybrid. The concept of a joint or hybrid earmark suggests that it may not be a simple matter to categorize earmarking decisions definitively as the exclusive domain of one branch of government or another.

Definitions in the 110th Congress

During the 110th Congress, the House, Senate, and Bush Administration have defined terms like *congressional earmark*, *congressionally directed spending item*, and *earmark*, and provided some direction for how congressionally originated earmarks, according to these definitions, are to be handled in the budget process. Various definitions developed by the House, Senate, and Bush Administration are listed in **Table 1**. Some of the definitions are discussed later in this report.

¹⁰ For discussion, see CRS Report RL34373, *Earmarks Executive Order: Legal Issues*, by Thomas J. Nicola and T. J. Halstead.

¹¹ Attributed to Barry Anderson, a former OMB official and Congressional Budget Office deputy director. See Jackie Calmes, “In Search of Presidential Earmarks,” *Wall Street Journal*, Feb. 21, 2006, p. A6.

¹² For example, see Chuck Conlon and David Clarke, “‘War’ on the Floor,” Congressional Quarterly *BudgetTracker*, June 12, 2007, available at <http://www.cq.com/budgettracker.do> (subscription required). The article contains a link (listed as “[House Appropriations Committee Chairman David] Obey’s Prepared Briefing Material”) to a PDF file (“Obey Press Briefing,” June 11, 2007). The document reportedly provides what Rep. Obey considered to be examples of Administration earmarks for projects, grants, and contracts. See also Office of Republican Leader John Boehner, “Boehner Reacts to White House Announcement on Earmark Reform; Says Congress Should Go Further By Adopting Immediate Moratorium on All Earmarks,” press release, Jan. 28, 2008, available at <http://republicanleader.house.gov/News/DocumentSingle.aspx?DocumentID=82611>.

Table 1. Comparison of House and Senate Definitions in the 110th Congress for Congressional Earmark and Congressionally Directed Spending Item with Bush Administration Definitions for Earmark

Date	Where Published	Definition
<i>House and Senate Rules Definitions</i>		
Jan. 5, 2007	House Rule XXI, clause 9(d); Sec. 404 of H.Res. 6	“[T]he term ‘congressional earmark’ means a provision or report language included primarily at the request of a Member, Delegate, Resident Commissioner, or Senator providing, authorizing or recommending a specific amount of discretionary budget authority, credit authority, or other spending authority for a contract, loan, loan guarantee, grant, loan authority, or other expenditure with or to an entity, or targeted to a specific State, locality or Congressional district, other than through a statutory or administrative formula-driven or competitive award process.”
Sept. 14, 2007	Senate Rule XLIV, clause 5(a); Sec. 521 of P.L. 110-81 (S. 1)	“[T]he term ‘congressionally directed spending item’ means a provision or report language included primarily at the request of a Senator providing, authorizing, or recommending a specific amount of discretionary budget authority, credit authority, or other spending authority for a contract, loan, loan guarantee, grant, loan authority, or other expenditure with or to an entity, or targeted to a specific State, locality or Congressional district, other than through a statutory or administrative formula-driven or competitive award process[.]”
<i>Bush Administration Definitions</i>		
Jan. 25, 2007	OMB Memorandum M-07-09	“Earmarks are funds provided by the Congress for projects or programs where the congressional direction (in bill or report language) circumvents the merit-based or competitive allocation process, or specifies the location or recipient, or otherwise curtails the ability of the Administration to control critical aspects of the funds allocation process.” ^a
Mar. 12, 2007, until sometime between June 21 and July 11, 2007	First paragraph of OMB “Earmarks” website homepage, at http://earmarks.omb.gov ^b	“Earmarks are funds provided by the Congress for projects or programs where the congressional direction (in bill or report language) circumvents the merit-based or competitive allocation process, or specifies the location or recipient, or otherwise curtails the ability of the Executive Branch to properly allocate funds.”
May 31, 2007	OMB Memorandum M-07-17 ^c	“Earmarks are funds provided by the Congress for projects or programs where the congressional direction (in bill or report language) circumvents Executive Branch merit-based or competitive allocation processes, or specifies the location or recipient, or otherwise curtails the ability of the Executive Branch to manage critical aspects of the funds allocation process.”
Sometime between June 21 and July 11, 2007, to present	First paragraph of OMB “Earmarks” website homepage, at http://earmarks.omb.gov ^b	“Earmarks are funds provided by the Congress for projects or programs where the congressional direction (in bill or report language) circumvents the merit-based or competitive allocation process, or specifies the location or recipient, or otherwise curtails the ability of the Executive Branch to properly manage funds.” ^d
Jan. 29, 2008	Executive Order 13457, Sec. 3(b)	“[T]he term ‘earmark’ means funds provided by the Congress for projects, programs, or grants where the purported congressional direction (whether in statutory text, report language, or other communication) circumvents otherwise applicable merit-based or competitive allocation processes, or specifies the location or recipient, or otherwise curtails the ability of the executive branch to manage its statutory and constitutional responsibilities pertaining to the funds allocation process.”

- a. In addition to this definition, the memorandum also provided a full page of “additional guidance to agencies on the definition of an earmark” in its Attachment B, which arguably was an inseparable part of the Administration definition.
- b. The OMB “Earmarks” homepage also linked to another page, available at http://earmarks.omb.gov/earmarks_definition.html, that provided the definition of *earmark* from the OMB January 2007 memorandum until sometime between May 4 and July 18, 2007, along with substantial but modified material from the memorandum’s Attachment B. After the “earmarks_definition.html” page was changed during this May to July period, the Web page provided the definition of *earmark* from the OMB May 2007 memorandum (introduced later in this report), instead of from the January 2007 memorandum.
- c. Although the definition provided in the May 2007 memorandum was somewhat different from the definition in the January 2007 memorandum, the May memorandum characterized the new version as follows: “We will continue to use the definition used in the baseline 2005 data collection.” The January 2007 memorandum, which appeared to have provided the definition to be used during OMB’s baseline effort, differed in several ways but has not been revised or rescinded.
- d. The previous homepage definition used the term *allocate* instead of *manage*.

Potential Explanations of Earmarking

There are several potential explanations of why Congress, the President, or an agency might earmark resources or benefits. These could include

- Members of Congress representing constituents in their electoral jurisdictions;¹³
- Congress fulfilling its constitutional obligation to exercise the power of the purse and sometimes to prevent encroachment by other branches of government;¹⁴
- Congress defining or constraining the scope of an agency's or the President's ability to exercise control of the allocation of public funds and resources;¹⁵
- Congress providing flexibility to agencies to adapt to changing conditions by not prescribing earmarked allocations in law and instead earmarking through report language;¹⁶
- Congress inviting and facilitating interbranch communications about congressional intent and expectations, agency needs, etc.;¹⁷
- Congress, the President, or an agency supplementing or supplanting funding provided by nonfederal sources for activities or projects;
- Congress, the President, or an agency accomplishing public policy goals, either at a generalized level or with particularized benefits or remediation for some entities or persons;¹⁸
- Congress, the President, or an agency earmarking to assist with legislative compromise on related or unrelated issues;¹⁹
- an agency utilizing discretion provided by law to engage expertise to help the agency accomplish its mission(s) and goals;²⁰

¹³ For related discussion, see CRS Report RL33686, *Roles and Duties of a Member of Congress*, by R. Eric Petersen; and Lee Hamilton, "What I Wish Political Scientists Would Teach about Congress," *PS: Political Science & Politics*, vol. 33, Dec. 2000, pp. 757-759.

¹⁴ The Constitution establishes the basic framework for appropriating funds (or otherwise allocating resources and benefits) under which Congress and the President operate. Congress's constitutional authorities related to appropriations and budgeting include several in Art. I, Secs. 7, 8, and 9, notably including what has been called the "power of the purse" and also an implied power of investigation and inquiry into executive branch operations. See CRS Report RL30240, *Congressional Oversight Manual*, by Frederick M. Kaiser et al.; and Richard F. Fenno, *The Power of the Purse: Appropriations Politics in Congress* (Boston: Little, Brown, 1966). The President's authorities include Art. II, Secs. 2 and 3, notably including veto power and the general duty to recommend measures to Congress for its consideration.

¹⁵ For related discussion, see D. Roderick Kiewiet and Mathew D. McCubbins, *The Logic of Delegation: Congressional Parties and the Appropriations Process* (Chicago: University of Chicago Press, 1991).

¹⁶ For related discussion, see *Lincoln v. Vigil*, 508 U.S. 182, at 192 (1993).

¹⁷ For related discussion, see CRS Report 98-558, *Appropriations Bills: What Is Report Language?*, by Sandy Streeter.

¹⁸ For related discussion, see James D. Savage, *Funding Science in America: Congress, Universities and the Politics of the Academic Pork Barrel* (Cambridge: Cambridge University Press, 1999); and Robert M. Stein and Kenneth N. Bickers, *Perpetuating the Pork Barrel: Policy Subsystems and American Democracy* (Cambridge: Cambridge University Press, 1995).

¹⁹ For related discussion, see Diana Evans, *Greasing the Wheels: Using Pork Barrel Projects to Build Majority Coalitions in Congress* (Cambridge: Cambridge University Press, 2004).

²⁰ For related discussion, see D. Roderick Kiewiet and Mathew D. McCubbins, *The Logic of Delegation*; and John E. Chubb, "U.S. Energy Policy: A Problem of Delegation," in John E. Chubb and Paul E. Peterson, eds., *Can the Government Govern?* (Washington: Brookings, 1989), pp. 57-76.

- the President representing a broad or narrow interest, or pursuing his or her policy preferences;²¹ and
- the President at his or her own discretion, exercising constitutional authority to propose for Congress's consideration measures he or she believes to be necessary or suitable for accomplishing a given end.²²

The explanations listed above are not necessarily comprehensive or mutually exclusive. Each potential function of earmarking might be interpreted to have advantages or disadvantages, depending on one's views regarding the proper definition, functions, process, and extent of earmarking.

Potential Concerns About Earmarking

Some concerns about earmarking have involved perceptions of inefficiency and insufficient transparency and scrutiny. With regard to earmarks originated by Congress, concerns were expressed, for example, in a hearing in 2006, during the 109th Congress. According to the views of those giving statements or providing testimony,

- “Congressional leaders and appropriators use earmarks as a leverage to get members to vote their way—often for monstrous spending bills that a member otherwise might oppose”;²³
- when “[Congress legislates] by report rather than actual legislation, we [Members] have given up our ability to challenge individual spending items”;²⁴ and
- “[e]armarking ... is done in many instances for good and sufficient policy reasons ... [b]ut in more recent years, the amount of earmarking ... has virtually exploded, and the motivation behind the earmarks, the nature of the earmarks has become more parochial and more political, rather than based on legitimate policy differences between the two branches of government.”²⁵

Concerns and questions about activities that some observers see as presidential or executive agency earmarking include

- an “explosion in contracting being engaged in by the Administration, especially contracting that is sole-sourced or not fully competitive,”²⁶ and “rapid growth in

²¹ For related discussion, see Jeffrey Tulis, “The Two Constitutional Presidencies,” in Michael Nelson, ed., *The Presidency and the Political System*, 8th ed. (Washington: CQ Press, 2006), pp. 62-66; and Louis Fisher, “A Dose of Law and Realism for Presidential Studies,” *Presidential Studies Quarterly*, vol. 32 (Dec. 2002), pp. 672-692.

²² For related discussion, see Charles O. Jones, *Separate But Equal Branches: Congress and the Presidency* (Chatham: Chatham House, 1995), pp. 77-81.

²³ Statement of Sen. Tom Coburn, in U.S. Congress, Senate Committee on Homeland Security and Governmental Affairs, Subcommittee on Federal Financial Management, Government Information, and International Security, *Earmark Reform: Understanding the Obligation of Funds Transparency Act*, hearing, 109th Cong., 2nd sess., Mar. 16, 2006 (Washington: GPO, 2006), p. 2.

²⁴ Testimony of Rep. Jeff Flake, *ibid.*, p. 7.

²⁵ Testimony of Scott Lilly of the Center for American Progress, *ibid.*, p. 19.

²⁶ Chuck Conlon and David Clarke, “‘War’ on the Floor,” Congressional Quarterly *BudgetTracker*, June 12, 2007, available at <http://www.cq.com/budgettracker.do>. The article contains a link (listed as “[House Appropriations Committee Chairman] Obey’s Prepared Briefing Material”) to a PDF file (“Obey Press Briefing,” June 11, 2007); see section titled “Executive Earmarking Through Contracting,” p. 13.

- no-bid and limited-competition contracts” in recent years, reportedly from \$67.5 billion in 2000 to \$206.9 billion in 2006;²⁷
- perceived comparative lack of transparency for presidential earmarks, because “[t]he information is hard to get. For all the talk of bringing transparency to Congress’s work, its earmarks—compared with the president’s—are relatively simple to find in spending bills and their companion committee reports”;²⁸ and
 - concerns about the use of discretion to allocate funds in ways not approved by Congress, such as House Appropriations Committee concerns expressed about the Department of Homeland Security (DHS) financing a facility using an “approach [that] represents a violation of the spirit, if not the letter” of certain reprogramming restrictions and notification requirements.²⁹

Bush Administration Policy Regarding Earmarks

Prior to the 110th Congress

Prior to the 110th Congress, the Administration had shown interest in congressionally originated earmarks. For example, the President’s budget proposal for FY2002 proposed to “curtail congressional earmarking, especially for special interest spending.”³⁰ The next year, the President’s budget proposal for FY2003 devoted considerable attention to earmarks originated by Congress, stating “congressional earmarking mars merit-based processes for distributing the American people’s resources.”³¹ The *Budget* volume contained agency-specific discussions of the subject. In addition, it contained general statements characterizing the Administration’s views on the use of budgetary discretion by the President and agency officials, on one hand, versus the use of budgetary discretion by Congress on the other.

The Administration appeared to put less emphasis on earmarks in its budget proposal for FY2004.³² In subsequent years, under its Program Assessment Rating Tool (PART) initiative, the Administration focused on congressionally originated earmarks in specific areas. In the PART’s first year, for example, an illustrative Administration statement was that “earmarked funding will not contribute to the [program’s] long-term goals,” as set by the Administration.³³

²⁷ U.S. Congress, House Committee on Oversight and Government Reform, Majority Staff, *More Dollars, Less Sense: Worsening Contracting Trends Under the Bush Administration*, June 2007, p. 6, available at <http://oversight.house.gov/features/moredollars/>.

²⁸ Jackie Calmes, “In Search of Presidential Earmarks,” *Wall Street Journal*, Feb. 21, 2006, p. A6.

²⁹ U.S. Congress, House Committee on Appropriations, *Department of Homeland Security Appropriations Bill, 2008*, report to accompany H.R. 2638, 110th Cong., 1st sess., H.Rept. 110-181 (Washington: GPO, 2007), p. 86.

³⁰ U.S. Executive Office of the President, Office of Management and Budget, *A Blueprint for New Beginnings: A Responsible Budget for America’s Priorities* (Washington: GPO, Feb. 2001), p. 171, available at <http://www.whitehouse.gov/omb/budget/fy2002/>.

³¹ U.S. Executive Office of the President, Office of Management and Budget, *Budget of the U.S. Government, Fiscal Year 2003* (Washington: GPO, 2002), p. 54.

³² For example, the word “earmark” appeared 121 times in the President’s *Budget* volume for FY2003 and once in the volume for FY2004.

³³ U.S. Executive Office of the President, Office of Management and Budget, *Performance and Management Assessments, Fiscal Year 2004* (Washington: GPO, 2003), p. 108.

Bush Administration Policy During the 110th Congress

During the 110th Congress, the subjects of congressionally originated earmarks and, more generally, the use of discretion in budgetary decision-making garnered significant attention from both Congress and the Bush Administration.³⁴ The House of Representatives amended House Rule XXI on January 5, 2007, to define the term *congressional earmark*, and the Senate established a new Rule XLIV on September 14, 2007, to define *congressionally directed spending item* (see **Table 1**). Both chambers also adopted requirements for the disclosure of congressionally originated earmarks. Coinciding with these congressional developments, the articulation and evolution of Bush Administration policy began in January 2007.

Bush Administration Actions Prior to E.O. 13457

In various forums during January and February 2007, the President proposed that congressionally originated earmarks should be cut by at least 50% in number and funding in FY2008 appropriations, relative to FY2005, and no longer included in non-statutory report language.³⁵ OMB subsequently issued several memoranda to the heads of executive branch agencies that articulated Administration policies, defined the term *earmark* in several iterations, and required agencies to take certain actions.

Specifically, an OMB January 2007 memorandum provided an official Administration definition for the term *earmark* (see **Table 1**).³⁶ In addition to the definition, the memorandum's Attachment B provided a full page of "additional guidance" on the definition, which arguably was an inseparable part of the definition. For example, Attachment B said congressional direction that "places restrictions on some portion of [Administration-requested] funding" would count as an *earmark*.³⁷ Nevertheless, terms and expressions in the definition, including *circumvents*, *merit-based*, *competitive*, *otherwise curtails*, and *control critical aspects*, were left undefined or partially defined. The memorandum also directed agencies and OMB to identify and publicize information about congressionally originated earmarks on the Internet in order to call on Congress to reduce earmark numbers and funding relative to FY2005.

Three weeks later, an OMB February 2007 memorandum instructed agencies on how to handle non-statutory congressionally originated earmarks for the FY2007 budget, based on OMB's

³⁴ This report focuses on the actions of the President and OMB, as well as some related implications and issues for Congress, and does not discuss congressional efforts or procedures in detail.

³⁵ Presidential proposals that Congress reduce the number of earmarks by 50% and cease placing earmarks in report language were made in a Rose Garden press conference on Jan. 3, 2007; in the 2007 State of the Union Message, on Jan. 23, 2007; and in the President's budget proposal for FY2008, submitted to Congress on Feb. 5, 2007. For a press release and fact sheet regarding the Rose Garden press conference, see <http://www.whitehouse.gov/news/releases/2007/01/20070103.html>. The White House transcript of the State of the Union speech is available at <http://www.whitehouse.gov/news/releases/2007/01/20070123-2.html>. For the FY2008 budget proposal, see U.S. Executive Office of the President, Office of Management and Budget, *Budget of the U.S. Government, Fiscal Year 2008* (Washington: GPO, 2007), p. 1.

³⁶ U.S. Executive Office of the President, Office of Management and Budget, memorandum from Rob Portman, Director, "Collection of Information on Earmarks," M-07-09, Jan. 25, 2007, available at <http://www.whitehouse.gov/omb/memoranda/fy2007/m07-09.pdf>.

³⁷ A final Bush Administration definition of the term *earmark* was later established in E.O. 13457, but the term's meaning probably is still informed by previous versions and corresponding explanations of the Administration definition. In particular, the E.O.'s definition retains significant elements of the Administration's January 2007 definition (released in OMB's January 2007 memorandum). The OMB January 2007 memorandum provided the most comprehensive explanation, to date, of the meanings of several terms and concepts that were included in subsequent versions of the Administration definition.

interpretation of the full-year continuing resolution for FY2007.³⁸ According to the chairmen of the House and Senate Appropriations Committees, the full-year measure was “free of earmarks.”³⁹ Agencies were instructed by Section I of OMB’s memorandum that they “should not” fund non-statutory earmarks, but also told “the Administration welcomes input to help make informed decisions.” In the absence of non-statutory earmarks, Section II of the memorandum told agencies to apply “authorized discretion” using “transparent and merit-based determinations to achieve program objectives, consistent with the purpose of the statute and Administration policy (including the President’s Budget).” Viewed in concert with the OMB January 2007 memorandum, the February 2007 memorandum’s use of terms may have had implications for how to understand the Administration’s definition of *earmark* (in the January 2007 memorandum) and the Administration’s characterizations of its own budgetary decision making. Among other things, Section II appeared to leave open the possibility of overlap between the terms *merit-based* and *consistent with Administration policy* in some contexts.

Starting in March 2007, OMB followed up on its January 2007 memorandum by establishing an “Earmarks” website. In succeeding months, the website presented an expanding database of Administration-defined and -identified *earmarks* corresponding to FY2005 appropriations, FY2008 appropriations, FY2009 appropriations, and several past authorization measures.⁴⁰ The website’s explicit purposes were, among others, to establish a “benchmark” for measuring whether Congress “achieve[d] the President’s cut in half goal” for FY2008, and to “encourage and inform the debate over how taxpayers’ money is spent.”⁴¹ The homepage of the website also included as its first paragraph a somewhat different definition of *earmark* from the one published in January 2007 (see **Table 1**). With the posting of individual earmarks in OMB’s database, it became possible to observe how the Administration’s definition of *earmark* was implemented in practice. Many of the Administration’s designations of items as *earmarks* focused on congressional specification, in bill or report language, of a receiving entity or geographic location. Congressionally specified items that previously had been requested by the Administration did not appear to be included in the database. Other items in the database fell outside the category of specifying a recipient or geographic location, however.⁴² For example, the datasets of FY2005 appropriations- and authorization-related *earmarks* include items that reportedly were made by telephone call, made through language in the *Congressional Record*, and modified from bill or report language through what OMB appears to call “congressional letters of intent.”⁴³ It is not clear, however, if all such instances are included in the database.

³⁸ U.S. Executive Office of the President, Office of Management and Budget, memorandum from Rob Portman, Director, “To Provide Guidance to Departments and Agencies About Obligating FY 2007 Funds Under a Full-year Continuing Resolution (CR) with No Congressional Earmarks,” M-07-10, Feb. 15, 2007, available at <http://www.whitehouse.gov/omb/memoranda/fy2007/m07-10.pdf>.

³⁹ U.S. Congress, House Committee on Appropriations, “Democrats File Joint Funding Resolution for FY 2007,” press release, Jan. 29, 2007, available at http://appropriations.house.gov/News/pr_070129.shtml.

⁴⁰ See <http://earmarks.omb.gov>. FY2008 figures were described as “estimates” until July 2008, when they were revised. FY2009 figures also were initially described as estimates.

⁴¹ The quotations are from U.S. Executive Office of the President, Office of Management and Budget, “OMB Director Rob Portman Statement on Initial Phase of Earmark Database,” press release, Mar. 12, 2007; and U.S. Executive Office of the President, Office of Management and Budget, “Earmarks Database Establishes Benchmark for Cutting Earmarks in Half; Increases Transparency of Federal Spending,” press release, Apr. 4, 2007.

⁴² One of the Administration’s three criteria in the January 2007 OMB memorandum for identifying an *earmark* was “funds provided by the Congress for projects and programs where the congressional direction (in bill or report language) ... specifies the location or recipient.”

⁴³ See “Reference: Phone call from the Hill to the Secretary [of Energy],” available at http://earmarks.omb.gov/earmarks/earmark_225156.html; http://earmarks.omb.gov/earmarks/earmark_88464.html; and

A May 2007 memorandum provided another, somewhat different Administration definition of *earmark* (see **Table 1**).⁴⁴ The May memorandum instructed agencies to closely track earmarks during the FY2008 appropriations process to measure whether Congress met the President's goal.

Final action on FY2008 appropriations occurred in late 2007, with enactment of the Department of Defense Appropriations Act, 2008 (P.L. 110-116) and the Consolidated Appropriations Act, 2008 (P.L. 110-161). On January 29, 2008, OMB posted a summary tally of Administration-identified FY2008 *earmark* numbers and funding: 11,737 *earmarks* and \$16.872 billion.⁴⁵ In July 2008, the FY2008 figures were changed to identify 11,510 *earmarks* and \$16.569 billion in associated funding.⁴⁶ In September 2008, the FY2008 figures were changed again to identify 11,524 *earmarks* and \$16.502 billion in associated funding.⁴⁷ That compared with the OMB FY2005 tally of 13,492 *earmarks* and \$18.944 billion.⁴⁸

FY2009 Veto Threat and Executive Order 13457

Following enactment of FY2008 omnibus appropriations, the President announced in his January 2008 State of the Union Message that he would veto FY2009 appropriations bills if Congress did not cut earmark numbers and funding by half relative to FY2008. The President also announced he would issue an executive order directing agencies to ignore future earmarks “not voted on [in a law] by Congress” (i.e., non-statutory earmarks).⁴⁹ Issued the next day, E.O. 13457 outlines what appear to be three explicit purposes: (1) reducing the number and funding of earmarks originated by Congress; (2) making “their origin and purposes ... transparent”; and (3) including congressionally originated earmarks in the text of bills instead of other documents. E.O. 13457 then instructs that agencies “should not” fund non-statutory earmarks, “except when required by law or when an agency has itself determined a project, program, activity, grant, or other transaction to have merit under statutory criteria or other merit-based decision-making.” The order also provides a new definition of *earmark*. This time, however, the definition was provided in a document with binding force on agencies (see also **Table 1**):

[T]he term “earmark” means funds provided by the Congress for projects, programs, or grants where the purported congressional direction (whether in statutory text, report language, or other communication) circumvents otherwise applicable merit-based or competitive allocation processes, or specifies the location or recipient, or otherwise curtails the ability of the executive branch to manage its statutory and constitutional responsibilities pertaining to the funds allocation process.

For all legislation enacted after January 29, 2008, E.O. 13457 requires agency heads to take “all necessary steps to ensure that”

http://earmarks.omb.gov/earmarks/earmark_162814.html.

⁴⁴ U.S. Executive Office of the President, Office of Management and Budget, memorandum from Rob Portman, Director, “Tracking Earmarks in the 2008 Appropriations Process,” M-07-17, May 31, 2007, available at <http://www.whitehouse.gov/omb/memoranda/fy2007/m07-17.pdf>.

⁴⁵ See http://earmarks.omb.gov/resources/static_pdfs/2008_Earmarks_Summary_for_Website.pdf.

⁴⁶ The figures were posted in a PDF file that later was changed. A printout of the previous version is available from the authors to congressional clients upon request.

⁴⁷ See http://earmarks.omb.gov/resources/static_pdfs/2008_Earmarks_Summary.pdf. OMB's “Earmarks” website said that some 2008 data were “adjusted ... for comparability to 2009 estimates” for certain FY2009 appropriations bills.

⁴⁸ See http://earmarks.omb.gov/appropriations_home.html. Figures are rounded by CRS.

⁴⁹ The transcript of the speech is available at <http://www.whitehouse.gov/news/releases/2008/01/20080128-13.html>.

- agency funding decisions for “any earmark” are “based on the text of laws” and not based on a variety of non-statutory means, including “any other non-statutory statement or indication of views of the Congress, or a House, committee, Member, officer, or staff thereof”;
- agency funding decisions for “any earmark” are “based on authorized, transparent, statutory criteria and merit-based decision making”;⁵⁰ and
- “no oral or written communications concerning earmarks shall supersede statutory criteria, competitive awards, or merit-based decision-making.”

The executive order also outlines the process by which agency heads are required to handle congressional communications about non-statutory earmarks. Communications are required to be received in writing in order to be considered. In addition, they are required to be posted on the Internet by the receiving agency within 30 days, unless “otherwise specifically directed by the head of the agency, without delegation, after consultation with the Director of the Office of Management and Budget.”

Analysis of E.O. 13457

E.O. 13457, taken in the context of other Administration action related to earmarking policies,⁵¹ appears to reflect a comprehensive articulation of the Administration’s (1) definition of *earmark* and (2) views on the appropriate roles of Congress and the President in the allocation of resources and benefits for public purposes.⁵² Among other things, it could be argued that the executive order reflects a view that congressional allocation of resources and benefits for public purposes “often lead[s] to wasteful spending” if it does not leave to the President and his Administration discretion to make certain funding allocations based on its interpretations of merit, competition, and statutory criteria.⁵³ In this view, congressional direction that would fully limit the President’s or an agency’s discretion—for example, congressional specification of a location or recipient in statute or report language—would appear to be automatically considered an *earmark*. It could also be argued that the Administration’s various definitions have used terms such as *control* and *manage* to mean the Administration’s use of discretion to allocate funds in ways that comport with the Administration’s views of competition and merit, without certain *restrictions*. Terms

⁵⁰ The executive order requires decisions to be made according to instructions in the OMB February 2007 memorandum, which, in the absence of congressionally originated non-statutory earmarks, directed agency decision making to be “... consistent with the purpose of the statute and Administration policy (including the President’s Budget)” in areas of “authorized discretion.”

⁵¹ It is not clear whether the various *earmark* definitions included in the OMB memoranda, or on OMB’s “Earmarks” website, should be regarded as equivalent, iterative, or authoritative expressions of Administration policy at the time they were issued. From the available documents, however, it seems possible that the Administration might view the different versions as being substantively equivalent. This could be the case, because the various versions have not been explained by OMB to be different; definitions in earlier memoranda have not been withdrawn or revised; and one memorandum issued in May 2007 indicated that OMB and agencies would continue to use a prior definition used in the collection of data from FY2005, upon which the FY2008 50% cut goal was based. Nevertheless, it is likely that the definition promulgated in E.O. 13457 is the final version. For more on executive orders, see CRS Report RS20846, *Executive Orders: Issuance and Revocation*, by T. J. Halstead.

⁵² To the extent the Administration views the definitions it has used as equivalent (i.e., having no substantive changes in meaning; see **Table 1**), specific terms contained within the definitions might have equivalent meanings (e.g., “the Administration” and “the Executive Branch”; “control” and “manage”; “allocate” and “manage”; and “control critical aspects” and “properly allocate”).

⁵³ Quotation is from the White House, see “2008 Budget Fact Sheets” document, p. 3 of PDF file, available at <http://www.whitehouse.gov/infocus/budget/BudgetFY2008.pdf>; and from OMB, see “Fact Sheet: A Balanced Budget by 2012 & Earmark Reform,” p. 2 of PDF file, available at http://www.whitehouse.gov/omb/pubpress/2007/factsheet_010307.pdf.

such as *merit* and *restrictions* are left undefined or partially defined. However, the Administration has not explicitly articulated its position on the appropriate roles of Congress and the President in the allocation of resources and benefits for public purposes.

A number of more specific observations might be offered about aspects of E.O. 13457, both when viewed alone and in combination with the President's veto threat in the 2008 State of the Union speech.

Budgeting Roles of Congress and the President

If agencies comply with E.O. 13457 as written, the E.O. might alter the effectiveness of non-statutory earmarking by Congress. Agencies typically have felt an obligation to comply with these congressional directives. In place of these practices, the E.O. could be used to attempt to reverse roles, with Members who seek non-statutory earmarks making formal requests of agencies, and possibly the White House. According to the E.O., agency funding decisions (but not necessarily White House decisions) are to be made "in the manner set forth" in Section II of the OMB February 2007 memorandum. Under the memorandum, decisions are required to be based on (1) "statutory criteria, such as funding formulas, eligibility standards, and merit-based decision-making," which often leave considerable discretion, and (2) in areas of significant discretion, "merit-based determinations." The basis for "merit-based determinations" is not further defined in the E.O. or February 2007 memorandum, except that decisions in areas of significant discretion would be required to be consistent with the "purpose of the statute" and "Administration policy (including the President's Budget)." Given various estimates of the extent of earmarking originated by Congress, the resources involved are considerable, likely amounting to billions of dollars. At the same time, the resources constitute only a small percentage (less than 1%) of the annual federal budget (nearly \$3 trillion in estimated outlays for FY2008).⁵⁴

Extent and Manner of Earmarking

When viewing the E.O. and veto threat in combination, one could argue that the Administration appears to be calling on Congress to both (1) legislate in detail, in statute, when allocating resources and benefits, instead of providing general lump sums in law and then being more specific in report language; and at the same time, (2) not legislate in detail too much, or risk a veto. It could also be argued that the process described in E.O. 13457 might strengthen the President's discretion, influence, and control over agency decision making, which may change the relationship between Congress and the executive agencies. In combination, the E.O. backed up by presidential vetoes, *if effective*, could be used in an attempt to limit Congress's legislative activities that concern resource allocation to only statutory text. Such a scenario also may leave uncertain the efficacy of many, if not most, other means that Congress has developed for overseeing and influencing agency resource allocation activities.

White House Role in Agency Decisions

It is not possible to predict how E.O. 13457 might be used in practice or might change interbranch dynamics, should it be strictly implemented. The E.O.'s framework, however, appears to allow the White House to become the arbiter of decisions about whether to honor non-statutory earmarks, if it wished to do so. For example, OMB could influence the processes for deciding the "merit" of non-statutory earmarks. The OMB Director has a role in determining whether to

⁵⁴ U.S. Executive Office of the President, Office of Management and Budget, *Budget of the U.S. Government, Fiscal Year 2009* (Washington: GPO, 2008), p. 139.

publicly disclose congressional requests or recommendations on the Internet and is provided the authority in the E.O. to issue additional, but unspecified, “instructions” to agency heads.

It is conceivable that the E.O., if it increases White House influence in agency decision making, might be used by a President as leverage at any point in the legislative process, regarding presidential nominations, or in other realms of interaction among Congress, agencies, the President, and perhaps also nonfederal actors. Public disclosure or non-disclosure of non-statutory earmark requests, and by implication, the prospect of agency or Administration decisions on the requests, could also occur only after “consultation” with the OMB Director. As the E.O. is implemented over time, however, experience might provide information on what OMB’s role, or roles, will be in practice.

Agency Consideration of Non-statutory Earmarks

E.O. 13457 does not require agencies to disregard non-statutory earmarks. Rather, the E.O. states that agencies “*should not* commit, obligate, or expend funds on the basis of earmarks included in any non-statutory source” (italics added). Even if an agency viewed a non-statutory earmark as having no merit under two explicit circumstances—“statutory criteria” or “other merit-based decision-making”—the E.O. does not strictly prohibit the agency from funding the non-statutory earmark. Therefore, these two explicit exceptions to the direction that agencies “should not commit, obligate, or expend funds” would appear to be only a subset of the potential exceptions to the Administration’s policy about whether or not to fund a non-statutory earmark. For example, if a non-statutory earmark were considered by an agency to have no merit, it appears that a decision to fund the earmark might still be made on the basis of “Administration policy (including the President’s budget)” (pursuant to Section 2(a)(ii)’s citation of the OMB February 2007 memorandum), or in response to input from OMB or the White House received under the E.O.’s Section 2(b) and 2(c) provisions.

Administration Definition of Earmark

The E.O.’s definition of *earmark* is not precise. Congressional direction that “specifies the location or recipient” appears to be clear in how it has been and would continue to be applied. Other language in the definition, however, relies on largely undefined terms and expressions that might allow for an expansive interpretation, if the Administration wished to use one.⁵⁵ Specifically, the E.O. definition provides two additional criteria that would classify “purported congressional direction (whether in statutory text, report language, or other communication)” to be an *earmark*. The additional criteria are “congressional direction” that (1) “circumvents otherwise applicable merit-based or competitive allocation processes,” or (2) “otherwise curtails the ability of the executive branch to manage its statutory and constitutional responsibilities pertaining to the funds allocation process.” With regard to the first, OMB has made statements that formulation of the President’s budget proposal is a *merit-based* and *competitive* allocation process. A statement during a press briefing by OMB Director Jim Nussle, in which he compared Administration budget formulation with congressional earmarking, is illustrative:

[W]e’re very transparent about all our proposals. They’re out there for the world to see, now on the Internet especially. These proposals are justified, with a number of detailed evidence [sic] behind them to justify exactly why we want to spend the programs where we want to spend them. They’re also merit-based and often competitively bid—most often,

⁵⁵ For example, the order does not define the terms *circumvents otherwise applicable*, *merit-based*, *competitive*, *otherwise curtails*, *manage*, and the executive branch’s *statutory and constitutional responsibilities pertaining to the funds allocation process*.

competitively bid. And they have the ability for Congress to pick and choose. Unfortunately, Congress doesn't always do that with its earmarking process. There are many that are air-dropped in into report language and nobody sees until the last moment, that Congress hasn't even voted on or doesn't even consider in open forum or open hearing. So I think it's a much different situation. And we have scrubbed through our budget for those kinds of situations and have removed them where we thought that was the case. But we believe that the Congress needs to change its ways on earmarking.⁵⁶

If the E.O. definition of *earmark* as "congressional direction ... [that] circumvents otherwise applicable merit-based or competitive allocation processes" were interpreted in light of such Administration statements, the definition might leave open the possibility of an expansive interpretation being applied. For example, it may be that the definition could include within its ambit congressional direction that diverges from the President's annual budget request. The second criterion, relating to congressional direction that "curtails the ability of the executive branch to manage its statutory and constitutional responsibilities pertaining to the funds allocation process," also is not precise and could be interpreted expansively, if the Administration wished to do so.

Potential Implications for Non-statutory Reprogramming

It is not clear what impact, if any, E.O. 13457 would have on non-statutory reprogramming directions imposed by Congress on agencies. Reprogramming typically refers to an agency shifting funds among activities within an appropriations account's lump sum, resulting in an allocation different from what was contemplated at the time appropriations were enacted (e.g., based on agency budget justification documents and other representations).⁵⁷ Congressional reprogramming directions (e.g., limiting how much can be shifted from one activity to another, requiring congressional notification or approval) are often included in report language and, as such, may not be legally binding. Appropriations committees have used reprogramming for decades to maintain oversight of agency activities and ensure that agencies allocate resources consistently with congressional intentions, while at the same time balancing an additional priority of giving agencies flexibility to adapt to changing circumstances rather than embed restrictions in law, which might be difficult and cumbersome to change in a timely way.⁵⁸ It is not clear whether the Administration's definition of *earmark* could be applied to reprogramming requirements and restrictions.

Subsequent Implementation of E.O. 13457

On September 30, 2008, the President signed H.R. 2638, the Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, 2009, into law.⁵⁹

The act included 3 of the 12 regular appropriations acts for FY2009, a long-term continuing appropriations resolution (CR) for the remaining 9 regular appropriations acts (providing funds

⁵⁶ Available at <http://www.whitehouse.gov/news/releases/2008/02/20080204-2.html>. See also David Clarke, "White House, Hill Trade Charges on Earmarks," *CQ Today*, June 7, 2007, p. 1; and Alexander Bolton, "Bush Called Out for His Earmarks," *The Hill*, June 28, 2007, p. 1.

⁵⁷ See U.S. Government Accountability Office, *A Glossary of Terms Used in the Federal Budget Process*, GAO-05-734SP, Sept. 2005, p. 85.

⁵⁸ See CRS Report RL33151, *Committee Controls of Agency Decisions*, by Louis Fisher.

⁵⁹ P.L. 110-329; 122 Stat. 3574.

through March 6, 2009), and a supplemental appropriations act for disaster relief and recovery.⁶⁰ Leading up to enactment, the President did not make any specific veto threats to FY2009 appropriations bills in Statements of Administration Policy (SAPs) on the basis of Administration-defined *earmarks*. Three weeks after enactment of the legislation, on October 23, 2008, OMB issued instructions to the heads of executive agencies on how to implement the FY2009 consolidated appropriations act “in accordance with” E.O. 13457.⁶¹

Criteria for Funding Statutory *Earmarks* in CR

OMB’s memorandum addressed several subjects. First, the memorandum told agencies that in implementing the Continuing Appropriations Resolution, 2009 (Division A of the law), agencies are legally obligated to fund an *earmark*, as defined under the E.O., only under certain conditions.

[I]n implementing the Continuing Appropriations Resolution, 2009 (the “FY09 CR”) agencies are legally obligated to fund an *earmark* only if the project, program, or grant is an *earmark* that meets all three of the following criteria:

- (1) was in the statutory text of the FY08-enacted appropriation (including earmarks that were statutorily incorporated by reference);
- (2) was of a continuing nature (rather than of a one-time, non-recurring nature); and
- (3) could not be carried out by funding the *earmark* in the remainder of FY09 (following the expiration of the FY09 CR) if Congress ultimately decides to provide continued funding in FY09 for that *earmark*.⁶²

The memorandum explained that if an *earmark* does not meet all three criteria, “then during the FY09 CR period an agency must only fund the *earmark* if the agency has itself determined that it has merit under statutory criteria or other merit-based decision-making.” This instruction referred to the E.O. and its incorporation, by reference, of directions included in Section II of the OMB February 2007 memorandum.

The memorandum further explained OMB’s third criterion, which directed agencies to be restrictive in how they fund statutory *earmarks*.

[S]ince Congress has directed agencies in Section 110 [of the FY2009 CR] to implement “only the most limited funding action of that permitted,” agencies shall not fund during the FY09 CR period those FY08 statutory earmarks that were of a continuing nature if such earmarks could still be funded in the remainder of FY09 (following the expiration of the FY09 CR) if Congress ultimately decides to provide continued funding in FY09 for those FY08-earmarked projects and activities (in other words, if an agency were to fund such FY08 earmarks during the FY09 CR period, then the agency would be infringing upon the prerogative of Congress in the coming months to set full-year FY09 funding levels). In this regard, Congress in the FY09 CR did not direct agencies to fund the FY08 statutory earmarks during the FY09 CR period.⁶³

⁶⁰ For detailed information and legislative history, see CRS Report RL34711, P.L. 110-329, by Robert Keith.

⁶¹ U.S. Executive Office of the President, Office of Management and Budget, memorandum from Jim Nussle, Director, “Guidance on Implementing P.L. No. 110-329 in Accordance with Executive Order 13457 on ‘Protecting American Taxpayers From Government Spending on Wasteful Earmarks’,” M-09-03, Oct. 23, 2008, available at <http://www.whitehouse.gov/omb/memoranda/fy2009/m09-03.pdf>.

⁶² *Ibid.*, p. 1 (emphasis in original).

⁶³ *Ibid.*, p. 3 (emphasis in original).

Non-Statutory Earmarks and the CR

For purposes of the FY2009 long-term CR, the memorandum also addressed non-statutory *earmarks* “that were in the reports and other non-statutory materials that concerned either the FY08 appropriations Acts or the (not yet enacted) full-year FY09 appropriations bills for those activities and programs that are funded by the FY09 CR.” The memorandum cited Supreme Court opinions that non-statutory earmarks are not legally binding. In addition, the memorandum told agencies that in “accordance” with provisions of both E.O. 13457 and the CR, they “shall not fund [non-statutory] earmarks during the FY09 CR period.”⁶⁴ Instead, the memorandum directed agencies to follow the requirements of the E.O.

Restriction on “New Starts” in the CR

The memorandum concluded its discussion of the CR by noting that the FY2009 long-term CR included language prohibiting “new starts.” OMB suggested this prohibition would apply to some *earmarks*.

Earmarks in Supplemental and Regular Appropriations Acts and Executive Branch Disclosure

The memorandum also directly addressed statutory and non-statutory *earmarks* contained in the supplemental and three regular appropriations acts. Funding in these acts was not subject to the long-term CR’s various restrictions. For statutory *earmarks*, OMB stated that agencies shall implement them “in a manner consistent with applicable law,” quoting the E.O. For non-statutory *earmarks*, the memorandum recited provisions of the E.O. that agencies are required to follow. In the latter case, it is not clear how or when agencies will work with OMB to determine which non-statutory *earmarks* will be made publicly available on the Internet, per the E.O.’s requirements, and which will remain undisclosed by the executive branch, subsequent to the E.O.’s required consultation between an agency head and the Director of OMB.

Potential Issues for Congress

The articulation and evolution of Bush Administration policy regarding congressionally originated earmarks may have implications for congressional budgeting and earmarking practices, working relations between Congress and the President, and working relations between Congress and agencies. The policy, therefore, may raise several general and specific issues for Congress, including the following:

- What are the appropriate budgetary roles and responsibilities for Congress, the President, agencies, and the public in the U.S. political system?
- How should earmarks be defined, identified, and overseen?
- What are the implications for Congress of the Bush Administration’s Executive Order 13457?
- What are the implications for Congress of the OMB “Earmarks” website and database of congressionally originated earmarks?

⁶⁴ In this context, the memorandum cited the CR’s provisions that provided funding (Sec. 101) and preserved congressional prerogatives to make final full-year funding decisions by requiring “only the most limited funding action ... in order to provide for continuation of projects and activities” (Sec. 110).

- Might Administration actions have consequences for congressional representational activities?

Budgetary Roles and Responsibilities in the U.S. Political System

Congress, the President, and individual agencies all have roles in the federal budget process, sometimes working together and sometimes at cross-purposes. The Constitution establishes a basic framework for this interaction. The Framers of the Constitution intended for Congress, the President, and the courts to work together, but also to jealously guard their own prerogatives, in order to better achieve the varied purposes set forth in the preamble to the Constitution. In the words of James Madison, there would be under the Constitution a “separation of the departments of power.” Rather than a complete separation of these “departments,” however, the principle called for connectedness and a blending:

[U]nless these departments be so far connected and blended as to give to each a constitutional control over the others, the degree of separation which the maxim [of separation of the departments of power] requires, as essential to a free government, can never in practice be duly maintained.⁶⁵

Under the Constitution, for example, Congress may use its power of the purse to specify through law, in greater or lesser detail, the process of how resources are to be allocated and distributed. Congress can also communicate to agencies through non-statutory means, such as report language. For example, Congress might communicate its intent concerning how resources are to be allocated in circumstances when legislating in detail might become unwieldy, galvanize opposition, or constrain the ability of agencies to adapt to changing circumstances.

In taking either of these actions—statutory or non-statutory—Congress may affect the decisions that the President and individual agencies make by (1) expanding or diminishing opportunities to use discretion; (2) increasing or decreasing transparency of presidential decisions or actions; and (3) increasing or decreasing the independence of federal agencies from presidential influence and policy preferences. The congressional decisions and processes might also leave greater or lesser amounts of discretion to agencies in executing the law and allocating resources.

The President, in turn, could potentially influence congressional decision making through tools such as the veto power, annual spending proposals that are required by law, arguably superior access to and control over information from agencies, and the ability to influence public opinion. The President may also influence decisions made by agencies through appointments of senior officials (subject to Senate confirmation) and the use, at times, of other levers to control agency decisions, which at times have been restricted by Congress.⁶⁶ In some respects, agencies are

⁶⁵ Federalist No. 48, in James Madison, Alexander Hamilton, and John Jay, *The Federalist Papers*, p. 308 (see also Federalist No. 47, p. 302).

⁶⁶ For example, during the George W. Bush Administration, these levers have included White House

(1) clearance of agency legislative testimony (see U.S. Executive Office of the President, Office of Management and Budget, Circular No. A-19, “Legislative Coordination and Clearance,” rev. Sept. 20, 1979, available at <http://www.whitehouse.gov/omb/circulars/a019/a019.html>);

(2) review of regulations and guidance documents (see CRS Report RL33862, *Changes to the OMB Regulatory Review Process by Executive Order 13422*, by Curtis W. Copeland);

(3) choice of performance metrics for measuring “success” in accomplishing agency purposes and missions (see CRS Report RL32663, *The Bush Administration’s Program Assessment Rating Tool (PART)*, by Clinton T. Brass; and U.S. Executive Office of the President, Office of Management and Budget, Circular No. A-11, “Preparation, Submission, and Execution of the Budget,” part 6, “Preparation and Submission of Strategic Plans, Annual Performance Plans, and Annual Program Performance Reports,” July 2007, available at <http://www.whitehouse.gov/>

sometimes “caught in the middle” between Congress and the President in their efforts to control and influence the purpose, design, and implementation of public policy.⁶⁷ From another perspective, agencies also sometimes wield influence or autonomy in constraining and helping to shape the actions of Congress and the President, in concert with coalitions of diverse stakeholders in the broader political system.⁶⁸

The Administration has stated that “[congressionally originated] [e]armarks are awarded through a Congressional political process, favoring those who have direct access to elected officials or indirect access through lobbyists.”⁶⁹ The Administration has juxtaposed this perspective with a view of presidential and agency decision making that is “subject to a competitive or merit-based process to ensure higher priorities are funded first.”⁷⁰ This raises other questions. For example, is budgetary decision making in the White House, among political appointees, or among career civil servants less “political” than in Congress? Or is it “political” in a different way? What role does access to elected or appointed officials, either directly or through lobbyists, play in budgetary decision making in the executive branch? Given the apparent room for the exercise of discretion by Congress, the President, and agency officials at various points in the budget process, how should constitutional obligations and powers be reconciled with practical considerations and concerns? How may diverse views about representation, constitutionally prescribed responsibilities, effectiveness, efficiency, equity, transparency, ethics, and accountability be reconciled?

In addition, the President proposed that Congress stop including earmarks in report language and instead place them in statute. He expressed his intention to enforce the proposal with his executive order. Congress and agencies have a long history of using report language to guide agency decisions, facilitate communications and accountability, and provide more specificity in expectations about actions or funding. Interaction with agencies through report language at times may provide flexibility to agencies that would not be available if provisions were included in statute. Some observers see report language as allowing insufficient scrutiny in the legislative

omb/circulars/a11/current_year/a11_toc.html);

(4) review of agency actions in the management of mandatory spending programs (see U.S. Executive Office of the President, Office of Management and Budget, memorandum from Joshua B. Bolten, Director, “Budget Discipline for Agency Administrative Actions,” M-05-13, May 23, 2005, available at <http://www.whitehouse.gov/omb/memoranda/fy2005/m05-13.pdf>); and

(5) establishment of links between Administration-chosen performance metrics and individual employee performance appraisals (see CRS Report RS21416, *The President’s Management Agenda: A Brief Introduction*, by Virginia A. McMurtry; and Bush Administration “Standards for Success” for “Strategic Management of Human Capital,” available at <http://www.whitehouse.gov/results/agenda/standardsforsuccess08-2007.pdf>).

⁶⁷ See David H. Rosenbloom, *Building a Legislative-Centered Public Administration: Congress and the Administrative State, 1946-1999* (Tuscaloosa: University of Alabama Press, 2000); Louis Fisher, *The Politics of Shared Power: Congress and the Executive*, 4th ed. (College Station: Texas A&M University Press, 1998); Charles O. Jones, *Separate but Equal Branches: Congress and the Presidency*; Peter Woll, *American Bureaucracy*, 2nd ed. (New York: W.W. Norton and Co., 1977); and Louis Fisher, *Presidential Spending Power* (Princeton: Princeton University Press, 1975).

⁶⁸ See Daniel P. Carpenter, *The Forging of Bureaucratic Autonomy: Reputations, Networks, and Policy Innovation in Executive Agencies, 1862-1928* (Princeton: Princeton University Press, 2001). In this light, some observers have viewed federal agencies as “an important check on irresponsible actions of the President or Congress” (see Peter Woll, *American Bureaucracy*, 2nd ed., p. 250), and others have viewed independence as a source of concern under some circumstances (see overview of “rational choice” theory in H. George Frederickson and Kevin B. Smith, *The Public Administration Theory Primer* (Boulder, CO: Westview Press, 2002), pp. 185-206).

⁶⁹ U.S. Executive Office of the President, Office of Management and Budget, “Detailed Information on the Health Care Facilities Construction and Other Miscellaneous Congressional Earmarks Assessment,” 2005, available at <http://www.whitehouse.gov/omb/expectmore/detail/10003514.2005.html>.

⁷⁰ Ibid.

process, as the Administration has argued. Others, however, see report language as facilitating two-way communication between Congress and agencies. One analyst judged that “controls” in report language have “proved to be a helpful device in permitting the delegation of discretionary authority to the agencies while at the same time retaining close legislative review.”⁷¹ What implications does the President’s executive order have for Congress, the President, and agencies, in terms of control over the design and implementation of public policies? What are the potential consequences for relations and communications between appropriations committees and agencies? If agencies ignore expressions of congressional intent related to earmarks under orders from the President, will that have implications for how executive agencies respond to other communications contained in report language?

Defining, Identifying, and Overseeing Earmarks

Debates over earmark definitions and transparency have taken place for some time, but no generally accepted definitions of earmark-related terms appear to have been established.⁷² Over time, however, a particular definition of *earmark* could become so widely used by observers that it becomes regarded as the authoritative definition, notwithstanding other definitions.⁷³ If a definition were broadly regarded as authoritative, future developments and debate on earmarks might be influenced accordingly, with resource allocation activities that fall under the definition more likely to be subjected to discussion and public scrutiny than activities that are excluded. From this perspective, it could be argued that if the Administration’s definition of earmarking as a solely congressional activity is widely accepted, future discourse and policy proposals may focus more and more on congressionally originated earmarks as opposed to earmarking by the President, political appointees, or career civil servants. Moreover, potential interpretations and connotations of the definitions might also come to be viewed as widely accepted (e.g., relating to concepts of merit and the appropriate processes for allocations of resources).⁷⁴

Members of Congress, several Presidents, and interest groups have expressed diverse views regarding (1) the perceived merit of earmarking activities and (2) which actors in the U.S. system of government should make decisions on how to allocate specific funds. The definition of the term *earmark* has the potential to change the terms of debate and the options considered. The evolution of the debate over earmark definitions, therefore, may have implications for the institutional capacities of Congress and the President to carry out their constitutional responsibilities and advance their policy or procedural preferences. In that light, Congress might consider the implications various definitions of *earmark* could have, if they were widely

⁷¹ For discussion, see CRS Report RL33151, *Committee Controls of Agency Decisions*, by Louis Fisher.

⁷² For example, although the House and Senate have both approved essentially identical written definitions for the terms *congressional earmark* and *congressionally directed spending item*, the Bush Administration has used somewhat differing definitions. In practice, there have been some instances of disagreement about how to apply definitions to particular circumstances. See, for example, John M. Donnelly, “Critics Decry Limited Definition of Earmarks in Defense Bill,” *CQ Today*, July 3, 2007, available at <http://www.cq.com> (subscription required).

⁷³ Examples of observers include the media, watchdog groups, academia, politicians, and the public at large.

⁷⁴ For example, the Administration has used the term *circumvents* in every iteration of its definition of *earmark* to characterize some congressional decision making, most recently defining *earmarks* (in the E.O.) as including “purported congressional direction ... [that] circumvents otherwise applicable merit-based or competitive allocation processes.” The word “circumvent” has been defined in two ways that might be relevant to the word’s usage in the Administration definition: (1) “to make a circuit around”; and (2) “to manage to get around esp. by ingenuity or strategem.” See *Merriam-Webster’s Collegiate Dictionary*, 11th ed. (Springfield, MA: Merriam-Webster, 2003), p. 225.

accepted, for (1) affecting the institutional capacities of Congress, the President, and agencies to function effectively in the U.S. system of government and (2) setting the terms of debate.

Earmarking by the President and Agency Officials

The President and agency officials can, and often do, make allocation and earmark decisions largely outside public view. For example, decisions oftentimes are made during budget formulation or during the budget execution process that may or may not be presented in agency budget justifications and reports to Congress.⁷⁵ Difficult issues—such as whether any presidential or Administration decisions to restrict, link, or condition awards of contract or grant funding to nongovernmental entities on the basis of their compliance or cooperation with presidential or Administration policy preferences constitutes a form of earmarking—may arise.⁷⁶ With regard to resource allocation, transparency in both decision-making processes and decision outcomes arguably would allow for scrutiny. Scrutiny, in turn, might confer some perception of merit for budget allocations that are able to withstand the scrutiny.⁷⁷

Full or Partial Transparency?

It is not clear if the Administration has included in its online database all instances of earmarks that agencies and the White House received through “other communication.” Pursuing that option might provide insight into how the Administration and agencies respond to congressionally originated earmarks that are not contained in bill or report language and whether items were included on a selective basis. On the other hand, it would not necessarily always be in the interest of agencies, the White House, or Members of Congress to disclose telephone-, letter-, and in-person-directed earmarks in the context of legislative negotiations among Congress, the President, and agencies.

⁷⁵ The use of discretion by a President or an agency official might not be transparent outside the White House or an agency, because decisions and their rationales might not be specifically highlighted or justified to Congress or the public before funds are obligated. After funds are obligated, it can often be difficult to assess (1) instances when discretion was used by specific actors, and (2) the factors that motivated or justified decisions on how to allocate and spend funds. In some situations, it may become difficult or impossible to define and identify specific allocation or earmarking behaviors by the President or agencies. If these topics were of interest, Congress might consider several oversight options. For discussion, see CRS Report RL30240, *Congressional Oversight Manual*, by Frederick M. Kaiser et al., and Mathew D. McCubbins and Thomas Schwartz, “Congressional Oversight Overlooked: Police Patrols versus Fire Alarms,” *American Journal of Political Science*, pp. 165-179.

⁷⁶ To the extent that such activities take place in the executive branch, the activities arguably could be considered analogous to the Administration’s characterization of congressionally originated earmarking as placing “restrictions” on the allocation of funding (see Attachment B to the January 2007 memorandum). For an example of allegations that the award of funds might have been conditioned upon certain actions, see Carol D. Leonnig, “HUD Questions Go Unanswered,” *Washington Post*, Mar. 16, 2008, p. A4.

⁷⁷ The issue of transparency with Homeland Security Grants might illustrate this tendency. In 2006, the Department of Homeland Security’s (DHS’s) announcement of funding allocations under the Homeland Security Grant Program (HSGP) was reportedly greeted with controversy due, in part, to perceptions of lack of transparency and concerns about whether funds were allocated based on risk as opposed to political considerations. (See, for example, Veronique de Rugy, “Is Your Town Safe From Terrorists?” *reasononline*, June 8, 2006, available at <http://www.reason.com/news/show/117458.html>.) The following year, DHS Secretary Michael Chertoff reportedly said he expected “fresh controversy over whether money was allocated according to risk or political pressure.” (See Spencer S. Hsu and Mary Beth Sheridan, “D.C., New York Get Biggest Increases in Counterterrorism Aid,” *Washington Post*, July 19, 2007, p. A1.) For the next year, DHS provided a considerably expanded description of its decision-making criteria and processes for FY2007 grants. (See U.S. Department of Homeland Security, *FY 2007 Homeland Security Grant Program [Allocation Overview]*, [July 18, 2007], available at http://www.dhs.gov/xnews/releases/pr_1184781799950.shtm and <http://www.dhs.gov/xgovt/grants/>.)

Are Congressionally Originated Earmarks Being Funded?

Currently, there is no publicly available, comprehensive source of information on whether, or the extent to which, congressionally originated earmarks are actually funded by agencies. Some information on this topic might be forthcoming in response to a non-statutory congressional directive to OMB that was approved in the explanatory statement associated with the Consolidated Appropriations Act, 2008, which provided appropriations to OMB. Specifically, in its report for the FY2008 Financial Services and General Government appropriations bill, the Senate Appropriations Committee directed OMB to

report to Congress no later than March 1, 2009, regarding the extent to which executive departments and agencies that administer directed funding allocate the designated amounts to intended recipients at a level less than the amount specified in any enacted bill or accompanying report describing such directed funding.⁷⁸

The Senate report language was subsequently approved in the explanatory statement corresponding to the FY2008 omnibus appropriations measure.⁷⁹ Past research suggests that, if OMB complies with the committee's directive, the resulting information may cite several kinds of instances in which *congressionally directed spending items*, or *congressional earmarks*, are not provided in the full amount to a recipient, including (1) if the President, OMB, or an agency decides not to allocate funds to a recipient (i.e., disregards the congressional directive or earmark); (2) if the President, OMB, or an agency decides to reduce a designated amount in light of set-aside requirements or administrative fees;⁸⁰ or (3) if the President, OMB, or an agency is unable to identify or find a recipient or finds the recipient legally ineligible to receive funds.

Executive Order 13457

E.O. 13457, both alone and in combination with the President's veto threat in the 2008 State of the Union Message, may have implications for the congressional appropriations process and potentially other legislative activities. It is not possible to predict how the E.O. will operate or be used in practice by the President, OMB, and heads of agencies, or whether the Administration might seek to use the E.O.'s framework as a source of leverage in bargaining in the legislative process. If the E.O. were a topic of congressional interest, several general options might be explored.⁸¹

⁷⁸ U.S. Congress, Senate Committee on Appropriations, *Financial Services and General Government Appropriations Bill, 2008*, report to accompany H.R. 2829, 110th Cong., 1st sess., S.Rept. 110-129 (Washington: GPO, July 13, 2007), p. 39.

⁷⁹ The Senate Appropriations Committee report language was "approved" in the explanatory statement corresponding to most of what became the FY2008 omnibus, which said, in relevant part, "report language included by the House (H.Rept. 110-207) or the Senate (S.Rept. 110-129) that is not changed herein is approved. This explanatory statement, while repeating some report language for emphasis, is not intended to negate the language referred to above unless expressly provided herein." (See "Explanatory Statement Submitted by Mr. Obey, Chairman of the House Committee on Appropriations, Regarding the Consolidated Appropriations Amendment of the House of Representatives to the Senate Amendment to H.R. 2764," *Congressional Record*, daily edition, vol. 153, Book II (Dec. 17, 2007), p. H16048.) Both the House and Senate Appropriations Committee websites linked to a PDF version of the explanatory statement and called the statement a "joint explanatory statement" (in this case, resulting from an exchange of amendments between the chambers rather than a conference agreement; see <http://appropriations.senate.gov/amendment.cfm> and http://www.rules.house.gov/110_fy08_omni.htm).

⁸⁰ For background, see CRS Congressional Distribution Memorandum, *To What Extent Do Executive Departments Use Funding for Appropriations-Related Earmarks to Pay for Administrative Expenses or Other Purposes?* Jan. 26, 2007, by Clinton T. Brass.

⁸¹ For more extensive discussion of the latter two bullets, see CRS Report RL34373, *Earmarks Executive Order: Legal*

- Given the undefined nature of some terms in the Administration's overall definition of *earmark*, as well as uncertainty how some aspects of the E.O. will operate or be used in practice, Congress could consider holding hearings or engaging in other information exchanges to clarify any questions of interest.
- In response to the E.O., Congress could include in statutory text what otherwise would have been non-statutory earmarks. Alternatively, Congress could incorporate by reference in statutory text any items contained in non-statutory documents.
- If Congress wished to strengthen, weaken, prevent, repeal, or otherwise alter the directions specified in the E.O. or the E.O. itself, or influence the practices called for by the E.O., Congress could consider legislating on the topic, possibly using approaches such as negotiation, appropriations limitations,⁸² revocation,⁸³ or delay of final action on FY2009 appropriations until after a new President takes office.

Potential OMB "Earmarks" Website and Database Issues

Two factors that may influence whether a given definition of *earmark* becomes more widely accepted or used include (1) ease of access to corresponding earmark data and (2) the extent of data that are made available. OMB's "Earmarks" website and database, which contain data on what the Administration views to be congressionally originated earmarks, are publicly accessible and are frequently cited in media stories on earmark issues. The OMB website gained further visibility after the Administration announced that the website's FY2005 appropriations data would serve as the baseline for measuring progress toward the President's goal of reducing earmarks for FY2008, and after the Administration began to include language about earmarks prominently in its Statements of Administration Policy regarding appropriations legislation. The FY2008 disclosure lists of earmarks published in House and Senate Appropriations Committee reports also have attracted considerable media attention.⁸⁴ Data from the congressional reports, however, have not been aggregated by federal entities in a way similar to the presentation on the OMB website.

Separately, a searchable website of funding for federal grant, contract, and loan awards that Congress required OMB to establish under the Federal Funding Accountability and Transparency Act of 2006 (FFATA) became operational in December 2007 as USAspending.gov.⁸⁵ In the absence of supplementary information, however, it is not clear that users of the FFATA-required website would be able to determine whether an award was earmarked by Congress. The databases that feed into the website do not contain information to separate awards corresponding to congressionally originated earmarks (according to congressional or Administration definitions) from awards that were originated by the President or agency officials.

Issues, by Thomas J. Nicola and T. J. Halstead.

⁸² See CRS Report 98-518, *Earmarks and Limitations in Appropriations Bills*, by Sandy Streeter.

⁸³ See CRS Report RS20846, *Executive Orders: Issuance and Revocation*, by T. J. Halstead.

⁸⁴ For discussion of congressional disclosure requirements, see CRS Report RS22866, *Earmark Disclosure Rules in the House: Member and Committee Requirements*, and CRS Report RS22867, *Earmark Disclosure Rules in the Senate: Member and Committee Requirements*, both by Megan Suzanne Lynch.

⁸⁵ P.L. 109-282. For discussion, see CRS Report RL34718, *The Federal Funding Accountability and Transparency Act: Implementation and Proposed Amendments*, by Garrett Hatch.

If the FFATA-required website does not include earmark information, then OMB's "Earmarks" website would appear to be the only federal government resource providing aggregate information on congressionally originated earmarks that is available to the public online, versus accessing individual committee reports, joint explanatory statements, and managers' statements.⁸⁶ OMB may then be in a position to set some parameters for public debate on earmarks. Because the OMB website is the most visible federal government resource for tracking *aggregated* totals of congressionally originated earmarks, many observers may regard it as the authoritative source of information on earmarks generally, reinforcing the perception that the Administration's definition is the standard for public debate. If Congress considered these matters to be of interest, it could consider several options along with their advantages and disadvantages.

Option: Status Quo

The OMB "Earmarks" website and database presumably would continue to provide information to the public that reflects the Administration's perspective on what does, and does not, constitute an *earmark*. In light of Administration statements that the website's purpose is, in part, to "encourage and inform the debate over how taxpayers' money is spent," some would view it as a means for the President to advocate his policy and budget process preferences, and facilitate the actions of nongovernmental actors (e.g., the media and public interest groups) to exercise scrutiny over Congress by performing additional analysis on the *earmark* data.

Option: A Congressional Online Database

Congress could consider the advantages and disadvantages of assembling its own centralized, aggregated database. In effect, pursuing this option would present the public with an alternative source of earmark information, in addition to the OMB "Earmarks" website, based on congressional definitions of earmark-related terms and congressional disclosure lists.

Option: Codification of OMB Website with Different Earmark-Related Definitions

Congress could require OMB to adopt a different definition of *earmark* for use in collecting information from agencies and posting data on the OMB "Earmarks" website. This option could allow for establishment of a definition more in concert with the definitions in each chamber's rules, in order to provide greater consistency in terms of data collection, debate, and analysis of earmarks across branches of government. The option also might constrain the President's ability to use OMB and agency budget offices and personnel to advance his proposals regarding congressionally originated earmarks. Critics of earmarking might argue that congressional definitions and practices do not allow for adequate scrutiny of congressional actions. Therefore, critics of earmarking might support the President's use of OMB and agency resources to establish the Administration's own definition and efforts to decrease the extent of congressionally originated earmarks. Some observers may also raise separation of powers questions if Congress required OMB to adopt a different definition of *earmark*.

⁸⁶ A joint effort by Taxpayers for Common Sense and the Sunlight Foundation, however, might become another, albeit nonfederal, resource. The two organizations developed a website based on TCS's designation of earmarks, available at <http://earmarkwatch.org/>, that is intended, among other purposes, to "[guide] citizen journalists to online resources on campaign finance, lobbying and federal spending." See <http://www.taxpayer.net/TCS/PressReleases/2007/09-24emwatch.pdf> for TCS's press release.

Option: Eliminate OMB “Earmarks” Website

Another option might involve limiting or cutting off funds for the OMB website and database. Pursuing this option might be perceived to bring advantages and disadvantages similar to the codification option. It also might engender a negative reaction from the media and, possibly, the public.

Option: Expand the FFATA Website

Information about congressionally originated earmarks might be made accessible through the FFATA-required website. For example, Congress could consider the advantages and disadvantages of amending the FFATA to require OMB to incorporate its “Earmarks” data into USAspending.gov. Integrating the data might address two objectives: to provide the public with as much information as possible about federal awards, and to enable the public to access that information from a single website. On the other hand, by mandating that USAspending.gov include data from the OMB “Earmarks” database, Congress might be perceived as accepting OMB’s definition of *earmark*. Alternatively, Congress could consider amending the FFATA to require incorporation of data from OMB’s “Earmarks” website, while also requiring that OMB adopt congressional definitions of earmark-related terms. This option, with advantages and disadvantages similar to those discussed above, might provide Congress more control over the earmark data provided to the public through USAspending.gov. Finally, Congress could pursue an option of requiring the FFATA website to include congressionally defined and identified earmarks without addressing the OMB website. This option is explicit in legislation that has been introduced.⁸⁷ Pursuit of the option would result in two federal, online sources of earmark information that might differ in part because of different underlying definitions. In addition, the FFATA website would not necessarily capture all congressionally originated earmarks as defined by House and Senate rules, if any were not associated with federal awards such as grants, contracts, or loans.

Possible Representational Consequences

Administration efforts to track congressionally originated earmarks and use the machinery of executive agencies to publicize its policy preferences arguably might affect Congress’s abilities to carry out representational activities that are an implicit component of its constitutional responsibilities. The Framers believed that the federal government needed to provide layers of representation that could incorporate national, state level, and more localized interests, while providing institutional checks and balances between Congress and the President. In the federal government, Members of Congress represent localized constituencies with interests and policy preferences that might or might not be perceived as aligned with broader, national interests. Members of Congress also act (1) individually, (2) in their respective chambers, and (3) between chambers, through deliberation and the legislative process, to come together to make laws for the Nation. A President proposes his or her preferred program of policies and takes care that laws passed by Congress are faithfully executed. In doing so, a President may use discretion sometimes to advance his or her policy preferences. The presidency has also been seen by many as representing broad national interests. The combination of layered representation and interbranch checks and balances arguably assures that the preferences of national and local constituencies are addressed in the national policymaking process. Preferences may be addressed sometimes through broad laws, and other times through the use of specific laws, non-statutory

⁸⁷ S. 3077, “Strengthening Transparency and Accountability in Federal Spending Act of 2008,” 110th Cong.

earmarks of benefits and resources, and administrative decisions targeted to areas of congressional or presidential policy preference.

The requirements of E.O. 13457, and the OMB “Earmarks” website and database, arguably subject the representational focus of Congress to greater scrutiny than the President’s representational activities. When viewed in isolation, this might be seen as an attempt to pursue transparency in government funding decisions, a goal that has been advanced by some congressional and executive branch leaders. Depending upon how one perceives the executive order and the OMB website fitting into the larger design of checks and balances, however, one might or might not see the long-term representational capacity of Congress as being affected or impaired if the executive order were fully implemented, or the OMB website were continued in its current format.

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